TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 299

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, ETC., PETITIONER

vs.

ISADORE N. HELLMAN

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Writ of Error.

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Isadore N. Hellman, Plaintiff,
No. 6989. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The President of the United States, To the Honorable Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri—Greeting:

Because, in the record and proceedings, and in the rendition of the judgment in a cause which is in the District Court, before you, at the March Term, 1925, wherein Isadore N. Hellman was plaintiff and Arnold J. Hellmich, Collector, was defendant, it is alleged manifest error hath happened to the injury and damage of the defendant, as by its complaint appears.

Therefore, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the 8th Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the 8th Circuit on or before the 10th day of January, 1926, to the end that the records and proceedings aforesaid being inspected,
2 the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

Witness, the Honorable Chas. B. Faris, Judge of the District Court of the United States within and for the Eastern District of Missouri this 10th day of November, 1925.

Seal
East. Div.
East. Jud. Dist.
of Missouri.

Issued at office in in the City of St. Louis with the seal of the District Court and dated as aforesaid.

JAS. J. O'CONNOR
Clerk, District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Allowed by:
C. B. Faris, Judge.

---

2 Return to Writ.

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Isadore N. Hellman, Plaintiff,
No. 6989. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

In obedience to the command of the within and foregoing writ, I herewith transmit to the United States Circuit Court of Appeals for the 8th Circuit a duly certified transcript of the record and proceedings in the above-entitled cause, with all things concerning the same.

Seal
U. S. Dist. Court
East. Div.
East. Jud. Dist.
of Missouri.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at office in the City of St. Louis, this 9th day of January, 1926.

JAS. J. O'CONNOR
Clerk.

---

4 Citation.

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Isadore N. Hellman, Plaintiff,
No. 6989. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The United States of America to Isadore N. Hellman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In Witness Whereof, I the undersigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this 10th day of November, in the year one thousand nine hundred and twenty-five.

C. B. FARIS,
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

HENRY H. FURTH,
Attorney for Plaintiff.

---

5 United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered, that heretofore to-wit: on the 17th day of February, 1925, there was filed in the office of the Clerk

of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a petition wherein Isadore N. Hellman is Plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is Defendant, Cause No. 6989 At Law, which said petition is in words and figures as follows, to-wit:

6 (Petition.)

Filed February 17, 1925.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

March Term, 1925.

Isadore N. Hellman, Plaintiff,
6989. vs.
Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, Defendant.

The plaintiff for his cause of action against defendant alleges as follows:

That plaintiff is a citizen of the United States and at all times hereinafter mentioned, resided and now resides in the City of St. Louis in the State of Missouri.

That the defendant was in the year 1923 and now is the duly appointed Collector of United States Internal Revenue for the First District of Missouri.

That this is a suit of a civil nature at common law, arising under the constitution and laws of the United States and under the laws of the United States pertaining to Internal Revenue.

That the plaintiff was on the 31st day of December, 1919 the owner of one half of the capital stock of Hellman & Sons Fur & Wool Company, a corporation organized and incorporated under the laws of the State of Missouri and carrying on business in the City of St. Louis as a dealer in furs and wool; that capital was a material income-producing factor in the business of said corporation and fifty (50%) per cent or more of its gross income consisted of gains and profits derived from trading as a principal.

That the books of account of said corporation showed that on said 31st day of December 1919 its paid-up capital stock was Twenty-seven Thousand Six Hundred Dollars ($27,600)

and its surplus was Sixty-one Thousand, Five Hundred
7 Sixty and 26/100 Dollars ($61,560.26); that on said day said corporation was also indebted to the United States for income tax and excess profits tax on its income for the calendar year 1919, the exact amount of which had not been ascertained and which did not appear on its books, but was later determined to be Fifteen Thousand Ninety-three and 99/100 Dollars ($15,093.99) leaving a net surplus at that time of Forty-six Thousand Four Hundred Sixty-six and 27/100 Dollars ($46,466.27 [Dollars]; that of said surplus at least Thirty-one Thousand, Five Hundred Forty-five and 58/100 Dollars ($31,545.58) consisted of earnings and profits accumulated by said corporation since February 28, 1913.

That on said 31st day of December 1919 said corporation was duly dissolved and liquidated, the assets thereof were distributed to the shareholders of said corporation in accordance with their several interests therein, and they assumed the liability of said corporation to the United States for taxes on its income for 1919.

That in said liquidation plaintiff realized a gain of Fifteen Thousand, Four and 55/100 Dollars ($15,004.55), all of which consisted of plaintiff's share of the surplus of said corporation and was a distribution made by said corporation to its stockholders out of its earnings or profits accumulated since February 28th 1913 and as such, was taxable to plaintiff as a dividend, as dividends are defined in Section 201 (a) of the Revenue Act of 1918.

That on or before the 15th day of March 1920 plaintiff made and filed with the Collector of United States Internal Revenue for the First District of Missouri, a return of his income, gains and profits for the calendar year 1919 in the manner and form prescribed by law; that plaintiff's total
8 taxable net income for said calendar year 1919 was Twenty-five Thousand, Ninety-nine and 50/100 ($25,099.50) Dollars derived from the following sources to-wit:

Salary	$10,012 50
Profit from the liquidation of Hellman & Sons Fur & Wool Co.	15,004.55
Other income	165.86
Taxable interest on U. S. obligations	56.07
	$25,238.98
Less allowable deductions	139.48
Net taxable income	$25,099.50

That under the provisions of Section 216 Subdivisons (a), (b), (c) of the Revenue Act of 1918 the plaintiff was entitled to the following credits for the purpose of the normal tax only, to-wit:

Subd. (a) The amount of the dividend, that is say, the gain realized by him from the liquidation of Hellman & Sons Fur & Wool Co.,	$15,004.55
Subd. (a) The amount of the dividend, that is to obligations of the United States and included in gross income,	56.07
Subd. (c) Personal exemption,	1,000.00
Total credits,	$16,060.62

That plaintiff's net income for the calendar year 1919 subject to normal tax was Nine Thousand, Thirty-eight and 88/100 Dollars ($9,038.88) of which said income the sum of Four Thousand Dollars ($4,000.00) was taxable at four (4%) percent and the remainder was taxable at eight (8%) percent; that the total normal tax due from plaintiff on his said income was Five Hundred Sixty-three and 12/100 Dollars ($563.12); that the surtax assessable thereon was One Thousand Two Hundred Ten and 95/100 Dollars ($1,210.95) and the total tax due from plaintiff on his income for the calendar year 1919 was One Thousand Seven Hundred Seventy-four and 07/100 Dollars ($1,774.07).

That thereafter, to-wit: on or about the 30th day of July 1923, the Commissioner of Internal Revenue gave
9 notice to plaintiff that an examination of plaintiff's income tax returns for the years 1919 and 1920 disclosed an additional tax liability on the part of plaintiff for Two Thousand, Three Hundred and Twenty-one and 35/100 Dollars ($2,321.35) for the year 1919 and an over-assessment of On Thousand Fifty and 49/100 Dollars ($1,050.49) for the year 1920, that is to say, a net tax liability of One Thousand Two Hundred Seventy and 86/100 Dollars ($1,270.86) and granted plaintiff thirty (30) days within which to file an appeal and show cause why such additional tax of Two Thousand, Three Hundred Twenty-one and 35/100 Dollars ($2,321.35) for the year 1919 should not be paid.

That thereafter, to-wit: on or about the 28th day of August 1923 plaintiff admitted liability for an additional tax of One Thousand One Hundred Twenty-one and 00/100 Dollars ($1,121.00) for the calendar year 1919, but denied liability

for the remainder of the alleged demand, to-wit: the sum of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35) and appealed to the Commissioner of Internal Revenue and showed cause why said amount of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35) should not be paid.

That thereafter to-wit: on or about the 8th day of January, 1924 said Commissioner of Internal Revenue advised the plaintiff that his appeal had been denied and that said additional tax of Two Thousand Three Hundred Twenty-one and 35/100 Dollars ($2,321.35) on his income for the calendar year 1919 would be assessed against him.

That the Commissioner of Internal Revenue thereupon recomputed plaintiff's tax on his income for the calendar year 1919 and reassessed the same as follows:

Said Commissioner allowed the plaintiff the following credits:

Taxable interest on U. S. Bonds,	$ 56.07
Personal Exemption,	1,000.00
	$1,056.07

But said Commissioner failed and refused to allow as a credit for the purpose of the normal tax as provided in Section 216 (a) of the Revenue Act of 1918, the sum of Fifteen Thousand, Four and 55/100 ($15,004.55) Dollars the gain realized by plaintiff in the liquidation of Hellman & Sons Fur & Wool Company, but included the same in the income subject to the normal tax, although it fully appears that said gain consisted of a distribution by said corporation to its shareholders out of its earnings or profits accumulated since February 28th, 1913, and said Commissioner of Internal Revenue assessed against plaintiff on his income for the calendar year 1919, including said gain of Fifteen Thousand Four and 55/100 Dollars ($15,004.55) in the liquidation of said corporation, a normal tax of One Thousand Seven Hundred Sixty Three and 47/100 Dollars ($1,763.47) and a surtax of One Thousand, Two Hundred Ten and 95/100 Dollars ($1,210.95) the total tax for said year assessed against plaintiff being, Two Thousand Nine Hundred Seventy-four and 42/100 Dollars ($2,974.42).

That thereafter, to-wit: on or about the 12th day of April 1924 defendant served notice on plaintiff of the assessment of said additional tax of Two Thousand Three Hundred

Twenty-one and 35/100 Dollars ($2,321.35) on plaintiff's income for the calendar year 1919 and of the credit of One Thousand Fifty and 49/100 Dollars ($1,050.49) the over-assessment against plaintiff for the year 1920, applying the same as a credit against said additional assessment of Two Thousand Three Hundred Twenty-one and 35/100 Dollars ($2,321.35), and defendant duly demanded of plaintiff payment of the sum of One Thousand Two Hundred Seventy and 86/100 Dollars ($1,270.86), being the amount of said additional assessment for the calendar year 1919, diminished by the amount of the over-assessment of One Thousand Fifty and 49/100 Dollars, ($1,050.49) for the calendar year 1920.

That on the 1st day of May 1924 plaintiff paid to defendant voluntarily, the sum of Seventy and 51/100 Dollars ($70.-51) the amount which plaintiff admitted to be due from him to the United States on account of balance of the tax on his income for the year 1919, and at the same time, in order to avoid distraint and penalties, paid to defendant, under protest, the sum of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35) the amount assessed against him by the Commissioner as additional tax on his income for 1919, for which liability is denied by plaintiff.

That thereafter, to-wit: on or about the 4th day of June 1924 plaintiff filed a claim with the Commissioner of Internal Revenue for the refund of said sum of One Thousand Two Hundred and 35/100 Dollars ($1,200.35) so paid
11 by plaintiff under protest.

That on or about the 12th day of November 1924 plaintiff was advised by said Commissioner of Internal Revenue, that his said claim for refund had been denied by said Commissioner of Internal Revenue.

That inasmuch as said gain of Fifteen Thousand, Four and 55/100 ($15,004.55) Dollars realized by plaintiff in the liquidation of the aforesaid corporation, said Hellman & Sons Fur & Wool Company, and returned by plaintiff as part of his income for the calendar year 1919, was a distribution made by said corporation to its shareholders out of earnings and profits accumulated by it since February 28th, 1913, said gain constituted a dividend as defined in Section 201 (a) of the Revenue Act of 1918 and was not subject to the normal income tax; and that the normal tax at the rate of eight (8%) percent assessed thereon was improperly and illegally assessed against the plaintiff and the collection of said tax

from the plaintiff by the defendant was improper and illegal, and the plaintiff is entitled to recover the same.

Wherefore, plaintiff demands judgment against the defendant in the sum of Twelve Hundred and 35/100 Dollars ($1200.35) with interest thereon at the rate of six (6%) percent per annum from the 1st day of May 1924 together with the costs and disbursements of this action.

(Signed) HENRY H. FURTH,
Attorney for Plaintiff,
720 Rialto Bldg., St. Louis.

State of Missouri,
City of St. Louis—ss.

ISADORE M. HELLMAN, the plaintiff herein, being first sworn according to law, makes oath and says that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

(Signed) ISADORE M. HELLMAN.

Subscribed and sworn to before me this 13th day of February 1925.

(Seal) (Signed) L. C. DIETRICH,
Notary Public.

My Commission expires Feb. 10, 1929.

---

12 (Demurrer of Defendant to Petition.)

Filed March 23, 1925.

Comes now Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the defendant in the above styled cause, by his attorney Claude M. Crooks, Assistant United States Attorney, and demurs to the petition herein, for the reason that the said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

(Signed) CLAUDE M. CROOKS.

---

13 (Order of Submission of Demurrer to Petition.)

June 1, 1925.

Now on this day comes plaintiff by his attorney and comes also defendant by the United States District Attorney for

the Eastern Judicial District of Missouri; whereupon the demurrer of the defendant to the petition of plaintiff is by agreement of parties submitted to the Court on briefs to be hereafter presented.

---

14 (Order overruling Demurrer to Petition.)

July 7, 1925.

Now on this day the Court having considered the demurrer of defendant to the petition of plaintiff herein, being fully advised in the premises, doth Order that said demurrer of defendant be, and it is hereby, overruled. (Oral Opinion.)

---

15 (Record Entry of Filing of Opinion on Overruling of Demurrer to Petition.)

July 10, 1925.

Now on this day there is received and filed herein memo of oral opinion of Court on demurrer of defendant to petition.

---

16 Memorandum of Oral Opinion of the Court.

This case was submitted to the Court some days since on a demurrer of the defendant to the petition of plaintiff.

Plaintiff sues defendant, as the Collector of Internal Revenue for the First District of Missouri, to recover the sum of $1,200.35 paid by him under protest, as a normal income tax on the sum of $15,004.55, derived, as the petition alleges, from plaintiff's one-half share in the surplus and profits of the Hellman & Sons Fur & Wool Company, which surplus and profits had accumulated since February 28th, 1913.

The above-named Company went into voluntary liquidation on the thirty-first day of December, 1919, and the capital stock, presumably, and the said surplus and profits, as it is alleged, were distributed among the plaintiff and one other, who, it seems, constituted all of the stockholders of this corporation.

When the above Company was liquidated it had a capital stock of $27,600.00, held, as already said, and surplus and profits of $61,560.26. This latter sum of surplus and profits was, it seems, ultimately reduced to the sum of $30,009.60,

by deductions and exemptions of a sort not pertinent to this inquiry. The sum which remains thereupon was divided between plaintiff and another, each of whom took one-half as each, as said, had theretofore held one-half of the capital stock of the liquidating company. I am dealing here, so far as the petition is concerned (by which alone I am bound, and with which alone I am concerned) with the surplus and profits accruing since February 28th, 1913. What became of the capital stock does not appear, nor is it in issue or pertinent, so far as the petition is concerned.

17 To the plaintiff's petition, setting forth, in effect, the facts above stated, defendant demurs generally, for that the petition does not state facts sufficient to constitute a cause of action against the defendant. The briefs on both sides concede that the single question is whether said sum of $15,004.55 was, or was not, subject to the normal tax of eight per cent., which is taxable by law as ordinary income.

The plaintiff contends that it was not so subject; the defendant contends contra. Both sides agree that the question mooted is to be solved by a determination of whether the sum of $15,004.55, tax on which is in dispute, fell under the provisions of subdivision (a) of Section 201 of the Revenue Act of 1918, or whether it fell under the provisions of subdivision (c) of said Section 201.

Plaintiff says that under the pleaded facts he is to be taxed under the provisions of subdivision (a) of the above section, while defendant contends that he falls within the purview of subdivision (c) of said section. Upon these opposite contentions both sides agree that the case turns.

So, it is obvious, without any further consideration of the law or of the statutes, that a decision of this mooted point will decide this case.

Skelitonized, so as sharply to present the point mooted, subdivision (a) of section 201, supra says:

"Sec. 201. (a) That the term 'dividend' when used in this title * * * * means (1) any distribution made by a corporation * * * * to its shareholders or members, whether in cash, or in property, or in stock of the corporation, out of its earnings or profits accumulated," since February 28, 1913.

Now, while it is also pleaded that the corporation was dissolved and liquidated on December 31, 1919, it is further pleaded that the sum of $15,004.55, tax on which is in dispute was distributed to plaintiff out of the net surplus and profits which had accumulated since February 28, 1913. The distribution, as far as the value of the capital stoct of $27,600.00 is concerned, is not disclosed and, as already forecast, such stock is only mentioned incidentally, and as a part of the history of the case, and the question of what became of it is not in controversy here.

Upon these pleaded facts defendant contends that subdivision (c) of Section 201 applies. This subdivision provides:

"(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or stock distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

From a reading of this subdivision it is clear that the case as pleaded does not fall into the category of the first sentence of subdivision (c), because the payment here was not made in stock, issued to the amount of the surplus and earnings accumulated.

The second sentence of subdivision (c) of Section 201, supra, says that

"Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

It will be noted therefore, that upon the face of subdivision (a) of section 201 supra, plaintiff falls precisely within its terms. The statute says "any distribution" shall constitute a dividend. A dividend is subject to a surtax, but not to a normal tax, as was here collected. This is so far the reason that such a dividend has already been charged with a normal tax at its source, and so ought not to be so charged a
19 second time, but ought of course, to be charged against the tax payer for the purpose of levying thereon a surtax as provided by statute.

I am of the view that subdivision (c) of section 201 is merely supplemental to subdivision (a) of said section. Gains might well accrue from the fact that the capital stock when

acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore, should bear not only a surtax in a proper case, but a normal tax also.

The words "realized thereby", as used in subdivision (c) supra, mean realized by the process or transaction of payment in exchange for stock or shares.

I have, correctly, I think, already eliminated the first sentence of this subdivision as inapplicable to the case as pleaded, and it will be observed that the last sentence of subdivision (c), supra, says nothing as to surplus of profits accumulated and distributed at the same time as capital is distributed.

This, I think, is taken care of by the provisions of subdivision (a) supra, even in a case of liquidation, wherein the surplus and profits accumulated since February 28, 1913, are involved and were distributed.

So construed, as supplemental to each other, well-known legal and objectionable evils are avoided, and a definite field, in no wise conflicting, is found for the operation and application of both subdivisions. Otherwise construed those provisions seem in hopeless conflict with each other.

The word "any", as used in subdivision (a) supra, is a broad term. It may well embrace distribution of surplus and profits accruing since February 28th, 1913, even though such surplus and profits are distributed upon final liquidation of the Company in which they accrue.

Moreover, subdivision (c) supra, does not in terms preclude this view; it merely says "other gains and profits." A dividend is a gain and a profit, and so a dividend is included in the term "gains and profits", and is made taxable, not as income, however, but as a dividend; that is, it is subject to the surtax only, and not to a normal tax.

No taxing statute ought, if it can be avoided, to be so construed as to levy a double income tax on identically the same money, and unless there is a plain, unambiguous statute so warranting, no tax ought to be exacted, or can be exacted. This latter rule is well settled. The former rule mentioned is a well known rule of construction.

It is fundamental, that a court is ordinarily not bound by the construction put upon the statute by the Commissioner of Internal Revenue. If such Commissioner construe a statute correctly, well and good; if he construes it erroneously, then the courts alone are saddled with the duty of authoritatively deciding what a statute means.

No regulation by the Treasury Department, which has the effect to bring one not required by statute to pay a tax, within the purview of such a statute, can stand; and, while it is regrettable that I can not agree with the Department's construction of these statutes, which is wholly in conflict with these views, plain rules of statutory construction have been, in my opinion, violated by the departmental view and by departmental regulation in attempting to construe the two statutes here dealt with in the expression of these views.

As forecast, I think I can see a field wherein subdivi-
21 sion (c) of Section 201 supra, may well operate, without the necessity of holding it in conflict with subdivision (a) of said section. This field, or one of the fields, at least, I have attempted to point out; there may be others. When this view is taken of it, the situation does not present one of double taxation, and the construction intended by Congress is rendered unambiguous. I am constrained to think that the view taken by the Treasury Department, as expressed in the Regulation under discussion, has the effect to doubly tax a single fund, and has the effect to exact a tax upon a section wholly ambiguous, and ambiguous to the extent that no valid tax can be collected thereunder.

I think the demurrer should be overruled, and so it is ordered.

(Order overruling Demurrer, etc.)

The demurrer in this case will be overruled, for the reasons given in case No. 6989.

These two cases are companion cases; what is said in one is wholly applicable to the other.

St. Louis, Missouri. July 7, 1925.

---

22 (Judgment, September 12, 1925.)

Now on this day comes plaintiff in the above entitled cause by his attorney and comes also defendant by the

United States District Attorney for the Eastern Judicial District of Missouri, and it appearing to the Court that defendant heretofore filed herein his demurrer to the petition of plaintiff, which demurrer was overruled, and defendant now in open court through said United States District Attorney declining to plead further herein, it is, therefore, on motion of said plaintiff by his attorney Ordered that judgment be entered herein in favor of plaintiff and against defendant in the sum of Twelve Hundred Dollars and Thirty-five Cents ($1200.35), together with interest thereon at the rate of six per cent per annum from May 1st, 1924, to date, such interest amounting to the sum of Ninety-eight Dollars and Eighty-three Cents ($98.83), making the aggregate finding and award of judgment in favor of plaintiff and against defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18);

It is, therefore, pursuant to action of defendant and finding and award by the Court as aforesaid, Ordered and Adjudged that plaintiff, Isadore M. Hellman, have and recover of defendant, Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the sum of Twelve Hundred Dollars and Thirty-five Cents, ($1200.35), together with interest thereon at the rate of six per cent per annum from May 1st, 1924, to date, such interest amounting to sum of Ninety-eight Dollars and eighty-three Cents ($98.83) making an aggregate judgment in favor of said plaintiff and against said defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18), and that plaintiff also recover of defendant his costs and charges herein expended.

---

23 Order for Enlarging time for Filing Bill of Exceptions.

September 18, 1925.

Comes now Allen Curry, United States Attorney for the Eastern Division of the Eastern Judicial District of Missouri, on behalf of the above styled defendant, Arnold J. Hellmich, Collector, and makes application for an order extending the time for filing of the Bill of Exceptions herein, and cause being shown therefor, and such application is granted and the time for the filing of the Bill of Exceptions of the above named defendant is extended for sixty days from and after September 18, 1925.

(Signed) C. B. FARIS.
Judge.

---

24 (Record Entry of filing of Petition for Writ of Error, etc.)

November 10, 1925.

Now on this day comes defendant in the above entitled cause and files herein his petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, together with his assignment of errors on such proposed writ of error, upon consideration whereof the Court doth Order that a writ of error be, and is hereby, allowed defendant as prayed. And now a citation is issued to plaintiff, citing and admonishing him to be and appear in said United States Circuit Court of Appeals within sixty days from and after this date, which citation is duly filed.

And now defendant files herein his praecipe for transcript on such writ of error, as well as election as to the printing of such transcript.

Petition for Writ of Error.

25 Filed November 10, 1925

Now comes the above named defendant, Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri and shows to the Court that on the 14th day of September, 1925 in this Court a final judgment was rendered in the above entitled cause in favor of the plaintiff, and defendant avers that in the record and proceedings had in said cause and also in the rendition of said judgment therein, certain errors were committed to the prejudice and injury of the defendant, all of which appear in detail in defendant's assignment of errors, which is filed in this cause with this petition for Writ of Error.

Wherefore, defendant prays that a writ of error may issue in his behalf returnable to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of the errors so complained of, and for the reversal of judgment entered in said cause; that a citation be issued by the Court directed to the plaintiff and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals, and for such further orders as may be proper in the premises.

(Signed) CLAUDE M. CROOKS
Assistant United States Attorney,
Attorney for Defendant.

To the Clerk of This Court:

The above petition is granted, let the writ issue as prayed.

(Signed) C. B. FARIS, Judge.

Assignment of Errors.

Filed November 10, 1925

26 Now comes the defendant in the above entitled cause and presents to the Court his assignment of errors which he alleges were committed in the record and proceedings had in said cause, and also in the rendition of said judgment in the above cause, to his prejudice and injury as follows:

I.

In overruling defendant's demurrer to plaintiff's petition.

Wherefore, because of the error herein above assigned, defendant prays that the judgment entered by the District Court in the above cause be reversed and set aside.

(Signed) CLAUDE M. CROOKS,
Assistant United States Attorney,
Attorney for Defendant.

---

27 (Copy of Citation and Acknowledgment of Service.)
The United States of America to Isadore N. Hellman —Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In witness whereof, I, the undesigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this ..... day of November, in the year one thousand nine hundred and twenty-fve.

(Signed) C. B. FARIS,
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

(Signed) HENRY H. FURTH,
Attorney for Plaintiff.

Praecipe for Transcript and Election as to Printing.

28 Filed November 10, 1925.

To, James J. O'Connor,
Clerk, United States District Court.

You are hereby notified that the defendant in the above entitled cause, in which a Writ of Error has been issued to the United States Circuit Court of Appeals for the 8th Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to-wit:

1. Petition.
2. Demurrer.
3. Memorandum of Oral Opinion of Court on Demurrer.
4. Record of entries of judgment.
5. Order Granting Writ of Error.
6. Order granting time to file Bill of Exceptions.
7. Order showing filing of same.
8. Petition for Writ of Errors.
9. Assignment of Errors.
10. Writ of Error and your return to same.
11. Citation.
12. Praecipe for transcript and certificate of Clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the Clerk of Said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals said

transcript here requested, in accordance with the rules of said Court of Appeals.

(Signed) CLAUDE M. CROOKS,
Attorney for Defendant.

---

29 (Clerk's Certificate to Transcript.)

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify, that the foregoing is a full, true and complete transcript of the record and proceedings in Cause No. 6989, At Law, wherein Isadore N. Hellman is plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First Internal Revenue District of Missouri is defendant, (except insofar as the same is restricted by the praecipe for transcript heretofore set out) as fully as the same remains on file and of record in my office, and that the Original Citation and writ of Error are hereto attached and herewith returned.

Seal
U. S. Dist. Court
East. Div. of East.
Jud. Dist. of Mo.

In Witness Whereof, I hereunto subscribe my name and affiix the seal of said Court at office in the City of St. Louis, in the Eastern Division of said District, this 9th day of January, in the year of our Lord, One thousand nine hundred and twenty-six.

JAS. J. O'CONNOR
Clerk of said Court
By Joseph T. Spelman, Deputy.

Filed Jan. 9, 1926, E. E. Koch, Clerk.

---

20 [Appearances of counsel; omitted in printing.]

21-22 ½ [Minute entry of argument and submission, Dec. 22, 1926; omitted in printing.]

23 In United States Circuit Court of Appeals, Eighth Circuit

No. 7298. December term, A. D. 1926

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, ETC., plaintiff in error

vs.

ISADORE N. HELLMAN, DEFENDANT IN ERROR

In error to the District Court of the United States for the Eastern District of Missouri

Mr. John R. Wheeler, special attorney, Bureau of Internal Revenue (Mr. Louis H. Breuer, United States attorney, Mr. Claude M. Crooks, assistant United States attorney, and Mr. A. W. Gregg, general counsel, Bureau of Internal Revenue, were with him on the brief), for plaintiff in error.

Mr. Henry H. Furth for defendant in error.

Before KENYON, Circuit Judge, and MOLYNEAUX and OTIS, District Judges

Opinion

Filed March 18, 1927

KENYON, Circuit Judge, delivered the opinion of the court.

Defendant in error was plaintiff in the trial court and will for convenience so be designated here. Likewise plaintiff in error will be designated as defendant.

Plaintiff brought suit to recover certain additional income taxes alleged to have been erroneously assessed and collected from him for the calendar year 1919. Defendant demurred to the petition.

The trial court overruled the demurrer. Defendant electing to
24 proceed no further, judgment was entered for plaintiff. The statements of the petition, taken as true for the purposes of the demurrer, establish that plaintiff on December 31, 1919, was the owner of one-half of the capital stock of Hellman & Sons Fur and Wool Company, a corporation of the city of St. Louis, Missouri. This corporation on that date entered into voluntary liquidation. The surplus and profits were distributed between the plaintiff and one other, they being all the stockholders of the corporation. The

corporation had a capital stock of $27,600.00, and a net surplus on December 31, 1919, of $46,466.27, of which $31,545.58 was earnings and profits accumulated by the corporation since February 28, 1913. Plaintiff realized a gain of $15,004.55, which he indicated in his return of income for the year 1919, but excluded from income subject to normal tax. He paid the surtax. The distribution so far as pertains to the capital stock is not disclosed by the record. The Commissioner of Internal Revenue held that plaintiff was subject to a normal tax upon the amount of $15,004.55, which plaintiff paid, and in this action sought to recover back the same. The District Court entered judgment therefor.

The issue is whether that part of the gain realized in the liquidation of the corporation, which is in fact a distribution of earnings or profits accumulated since February 28, 1913, is a dividend and therefore under the revenue act of 1918 not subject to the normal tax.

The revenue act of 1918 (40 Stat. L., chap. 18, Title 2, p. 1059), contains the following provisions applicable to this transaction:

"SEC. 201. (a) That the term 'dividend' when used in this title (except in paragraph (10) of subdivision (a) of section 234) means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since Febuary 28, 1913, or (2) any such distribution made by a personal service corporation out of its earnings or profits accumulated since February 28, 1913, and prior to January 1, 1918.

* * * * * * *

"(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

"SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the revenue act of 1916 and by section 1 of the revenue act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

"(a) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 216."

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived * * * from * * * dividends * * *. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period."

"SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

"(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by act of Congress."

It is conceded that a dividend from a going corporation paid out of current earnings is not subject to the normal income tax. Section 216 of the act so provides. But it is contended by defendant that there is a difference between dividends as defined in section 201 (a) and distributions in complete liquidation of the corporation under section 201 (c). Subdivision (a) uses the term "any distribution," which covers "every distribution." There could be no question that the distribution made by this corporation to plaintiff would be squarely within its definition of a dividend, unless subdivision (c) limits or changes the same. Section 201 (a) provides that the term "dividend" shall have the meaning therein given "when used in this title (except in paragraph 10 of subdivision (a) of section 26 234.)" This section does not pertain to any question involved here. It is apparent that section 201 (a) intends to provide a definition for the term "dividend" as used throughout the title, with the one exception referred to. The term "dividend" as used in section 216 (a) with reference to normal tax therefore has the meaning given to it in section 201 (a), which makes a distribution by a corporation to shareholders out of its earnings or profits accumulated since February 28, 1913, a dividend.

Is this changed by subdivision (c) of section 201?

Defendant contends that construing subdivision (a) and subdivision (c) of section 201 together it is manifest that subdivision (c) is in the nature of a limitation upon, or exception to, subdivision (a) and takes out of the realm of dividends gains or profits realized in liquidation of a corporation even if the distribution be of earnings or profits accumulated since February 28, 1913; that the situation is exactly the same as if plaintiff had sold his stock to another person and realized profit thereby; that the transaction is an exchange of the assets of the corporation for the outstanding stock; and that the gain or profit realized thereby is to be taxed to the distributee as other gains or profits, and that other gains or profits are subject to the normal tax.

In this connection we set out regulation 45, Article 1548, of the Treasury Department referring to this subject as follows:

"Distribution in liquidation: So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost, but less

than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock of March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable
27 from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock."

Of course this regulation sustains defendant's position. Congress has bestowed upon the Treasury Department the right to make needful rules and regulations for the enforcement of the provisions of the revenue act, and such regulations construing the laws of Congress relating to taxation are instructive, helpful, influential. This regulation is based on the Treasury Department's construction of the statute in question. We are not of course concluded thereby. Hemmer et al. v. United States, 204 Fed. 898.

Since the decision of this case by the trial court the United States District Court for the Western District of Kentucky in Langstaff v. Lucas, 9 Fed. (2d) 691, 694, has held along the line of the position urged by defendant in this case. That case was affirmed by the Circuit Court of Appeals of the Sixth Circuit (13 Fed. (2d) 1022) in a very short opinion, in which the court said that it affirmed the judgment upon the reasoning and conclusions of the district judge. The District Court in that case under facts somewhat similar to those here held that the distribution to Langstaff was not a "dividend as generally understood, and as defined in section 201, subsection (a), and as used in section 216." The court says: "Loosely speaking, the distribution to the stockholders of a corporation's assets, upon liquidation, might be termed a 'dividend'; but this is not what is generally meant and understood by the word. As generally understood and used, a dividend is a return upon the stock of its stockholders, paid to them by a going corporation without reducing their stockholdings, leaving them in a position to enjoy future returns upon the same stock." It is apparent that the court based its definition of the term "dividend" upon Lynch v. Hornby, 247 U. S. 339. And in this connection reference may also be made to Lynch v. Turrish, 247 U. S. 221, which is a companion case to Lynch v. Hornby. Article 1548 of regulation 45 of the Treasury Department, supra, is also evidently based upon the holdings of these two cases. In Lynch v. Hornby, supra, the court did draw a distinction between a distribution received as a single and final dividend in liquidation of the entire assets and business of a company and one where the payments of dividends were made by a going concern. Both of these cases relate to the act of October 3,
28 1913, which contains no definition of the term "dividend," and as pointed out in the note in Holmes Federal Taxes (1923 ed.)

and also (1925 ed.) pages 625 and 830, respectively, the question in both cases was whether earnings and profits accumulated prior to March 1, 1913, should be considered as dividends. There was no discussion at all of earnings or profits accumulated subsequent to March 1, 1913; no determination as to whether they should be considered as dividends. These cases are not authority for the proposition that a distribution, in the liquidation of a corporation, of assets accumulated subsequent to February 28, 1913, cannot be considered as a dividend under the revenue act of 1918. Congress had the right to provide what the term "dividend" as used in the act should cover and make it different from the usual understanding of the term, and that is what Congress did in section 201 (a).

If subdivisions (a) and (c) of section 201 can be construed together it should, of course, be done. One should not be permitted to defeat the other. United States v. Ninety-Nine Diamonds, 139 Fed. 961.

Does the construction of the act urged by plaintiff bring these two provisions into conflict?

The trial court pointed out in its opinion one field in which subdivision (c) could operate without conflict with subdivision (a), saying: "Gains might well accrue from the fact that the capital stock when acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore should bear not only a surtax in a proper case, but a normal tax also." Counsel for defendant in argument point out that the Hellman & Sons Fur and Wool Company had, when liquidated, a surplus of $46,466.27, of which $23,233.13 was distributed to plaintiff. Of this $15,772.79 represented his share of the earnings accumulated since February 28, 1913. If his stock had cost him par, his entire gain would have been $23,233.13, of which $15,772.79 would be attributable to the distribution of earnings accumulated since February 28, 1913, and $7,460.34 would have been profit in the liquidation within the meaning of section 201 (c). A situation would there be presented where the profit on the shares would be subject to both normal and surtax,
29 while on the part distributed of earnings accumulated since February, 1913, only the surtax would apply, and counsel for defendant claim that in this manner gains realized in liquidation of corporations would be taxed as other gains or profits. This illustration points out how the two subdivisions can be construed without fatal conflict.

A dividend is a gain or profit. Therefore the further language of subdivision (c) "any gain or profit realized thereby shall be taxed to the distributee as other gains or profits" includes dividends.

We are satisfied that subdivision (c) of section 201 is not an exception to or qualification of section 201 (a) but is supplemental thereto. Lynch v. Hornby and Lynch v. Turrish, supra, are not

authority against this view. Langstaff v. Lucas, supra, and the appeal of John E. Greenwood, a decision of the U. S. Board of Tax Appeals, are, but we are unable to agree with these decisions.

Defendant claims in his argument that the petition does not specify whether the $31,545.58 surplus of the corporation was "earned surplus," "paid-in surplus," or "appreciated value of capital assets." The petition states as to said surplus that it "consisted of earnings and profits accumulated by said corporation since February 28, 1913." We think this sufficiently describes the nature of the surplus. Plaintiff does assert that the surplus is a "gain realized in a liquidation." The important question, however, is what the surplus in fact is and not what it may be designated in the pleadings.

The question involved in this case is not easy of solution. It may fairly be considered a close one, and not free from doubt. Plausible argument can be presented for the position taken by either side to the controversy as to the construction of subdivisions (a) and (c) of section 201. That leads us to suggest that some elementary and fundamental rules of statutory interpretation ought to be applied, and if so, are controlling in a decision of this case.

It is both the English and the American rule that doubts in taxation statutes are resolved in favor of the taxpayer, and that laws imposing taxes are to be strictly construed and not extended beyond the clear import of the language used. It is the duty of taxing powers to make clear what is to be taxed and how. In
30 Gould v. Gould, 245 U. S. 151, 153, the court said: "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." Haiku Sugar Co. et al. v. Johnstone, 249 Fed. 103; Edwards v. Wabash Ry. Co., 264 Fed. 610; Hartranft v. Wiegmann, 121 U. S. 609; Eidman v. Martinez, 184 U. S. 578; United States v. Merriam, 263 U. S. 179; 2 Sutherland on Statutory Construction, vol. 2, p. 999.

There may be double taxation, but the purpose of the Congresses so to tax must be clear. As said in Tennessee v. Whitworth, 117 U. S. 129, 137: "Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and if property is taxed once in one way it would ordinarily be wrong to tax it again in another way when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition."

Courts will avoid if possible an interpretation of the statute which results in injustice. 25 R. C. L. p. 1022; Lionberger v. Rouse, 76 U. S. 468; United States v. Oregon & C. R. R., 164 U. S. 526; Knowlton v. Moore, 178 U. S. 41.

Under the contention of defendant here, if distribution of the surplus accumulated since February 28, 1913, had been made in the form of a dividend declared by the corporation the day before it was intended to liquidate and dissolve the same, it would have been a dividend and not subject to the normal tax; if distributed the next day in a final liquidation of the corporation it would be subject to the normal tax. The manner of distribution, if this position is correct, determines taxability, and not the character of the income. The statute should be clear to warrant such a conclusion which results in a double income tax, as these earnings of the corporation have already been fully taxed. Section 201 (c) does not say that the normal tax shall be assessed on distributions
31 of earnings accumulated since February 28, 1913, made by corporations in liquidation. It does not say that earnings so made shall not be considered dividends under section 201 (a). If Congress had intended that the definition of the term "dividend" in section 201 (a) should not include distribution by corporations in liquidation of earnings or profits accumulated since February 28, 1913, it would have been very easy to have said so. Shwab v. Doyle, 258 U. S. 529. That this section is not clear is shown by changes therein in the subsequent acts of Congress. The revenue act of 1921 omits the provisions as to distribution in liquidation in the 1918 act, and under its provisions the present question could not arise. We do not think this indicates an intention of Congress to change an established theory, but that it was the intention to end the injustice which the regulation of the Treasury Department brought about. We quote on this from Holmes Federal Taxes (1923 ed.), p. 630: "Congress has now definitely provided against the unfair and unwarranted practice of the Treasury Department under the 1918 law of subjecting such earnings or profits to both the normal tax and the surtax in case of the mere accident of their distribution in the liquidation of a corporation. Where a corporation distributes all of its property in complete liquidation or dissolution, the gain realized by the stockholder from the transaction is taxable as a dividend to the extent that it is paid out of the earnings or profits of the corporation accumulated since February 28, 1913. If the amount received by the stockholder in liquidation is less than the cost or other basis of the stock, a deductible loss is sustained."

While it is our opinion that the term "dividend" as used in section 201 (a) of the act of 1918 covers a distribution of a corporation to its stockholders out of earnings or profits accumulated since February 28, 1913, even if the distribution is not made until the liquidation of the corporation, and such distribution is not subject to the normal tax, if the question is to be considered as one not free of doubt, which seems to us the most that defendant can claim, then as we have before stated, that doubt should be resolved in favor of the taxpayer. A conclusion of the court along the lines urged by defendant would result in imposing taxes on plaintiff by a doubtful

construction of a taxing statute which would extend its provisions beyond the import of the language used and result in double taxation. We are not warranted in such conclusion, and while regretting to differ with the Circuit Court of Appeals of the
32 Sixth Circuit, a decision of the Board of Tax Appeals, and the regulation of the Treasury Department, we are satisfied the holding of the trial court was correct and the judgment is affirmed.

33 In United States Circuit Court of Appeals

[Title omitted.]

In error to the District Court of the United States for the Eastern District of Missouri.

Judgment

March 18, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed with costs, and that Isadore N. Hellman have and recover against Arnold J. Hellmich, collector of internal revenue for the first district of Missouri, the sum of twenty dollars for his costs herein and have execution therefor.

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35 Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

O